Supreme Court, U.S.
FILED

(1) 96 688 JUL 9 1996

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

HAO HOANG HO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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17 pp

QUESTION PRESENTED

1. Were the protections of the Fifth Amendment's Due Process Clause so unconstitutionally diluted and the burden of proof so unconstitutionally shifted as to absolutely require a new trial where the federal prosecutor argued to the jury directly against the presumption of innocence, during closing argument that, in order to find Defendant not guilty, the jury would have to find that the Government witnesses were guilty of a conspiracy to convict Defendant?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASON FOR GRANTING THE WRIT 4

I. THE HONORABLE COURT IS RESPECTFULLY REQUESTED TO EXERCISE ITS SUPERVISORY AUTHORITY UNDER SUPREME COURT RULE 10(A) OVER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT BECAUSE THE COURT OF APPEALS HAS SANCTIONED AN EGREGIOUS DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS . . 4

CONCLUSION 6

LIST OF APPENDICES

Page

APPENDIX A
OPINION, UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED 2-14-95 . . . . . A1

AFFIRMATION OF OPINION AND DENIAL OF PETITION FOR REHEARING, FILED 4-9-96 . . . . . A3

TABLE OF AUTHORITIES

Cases

1. Berger v. United States
295 U.S. 78 (1935) 5

2. Darden v. Wainwright
477 U.S. 168 (1986) 5

3. United States v. Robinson
485 U.S. 25 5

Constitutional Provision

United States Constitution,
Fifth Amendment 2, 5, 6

Statutes

18 USC 2 3

18 USC 3742(a) 4

21 USC 841(a)(1). 3

21 USC 841(b)(1)(c) 3

21 USC 846 3

28 USC 1254(1). 2

28 USC 1291 4

Rules

Supreme Court Rule 10(a) 4

FRAP 4(b) 4

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

HAO HOANG HO,
Petitioner,

vs.
UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI

Petitioner, HAO HOANG HO[1], respectfully seeks Certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

On 14 February 1995, the United States Court of Appeals for the Fifth Circuit entered its Opinion, per curiam, affirming the conviction of Petitioner, HAO HOANG HO, reproduced herein as Appendix A.

On 9 April 1996, the same court entered its Order, per curiam, denying a Petition for Rehearing, reproduced herein as Appendix B.

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[1]All the parties to this proceeding are listed in the caption of this petition.

JURISDICTION

The Opinion of the United States Court of Appeals for the Fifth Circuit, affirming Petitioner's conviction, was entered on 14 February 1996. The United States Court of Appeals for the Fifth Circuit denied a timely Petition for Rehearing on 9 April 1996. The jurisdiction of this court is invoked under Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

Petitioner, HAO HOANG HO, was initially charged in a multi-count, multi-defendant Indictment returned 24 August 1993, with the offense of Conspiracy to Manufacture and Distribute Methylenedioxy Methamphetamine (MDMA), in violation of 21 USC

Section 841(a)(1) and 21 USC Section 846 [Count 1]. On 1 September 1994, a superseding Indictment was returned against Petitioner alleging Conspiracy to Distribute Methylenedioxy Amphetamine (MDA) and oxy Methamphetamine (MDMA) in violation of 21 USC Section 841(a)(1), 841(b)(1)(c), and 18 USC Section 2 [Count 2].

Petitioner was tried before a jury on a plea of not guilty on 28 November 1994. Several witnesses testified on behalf of the Government. During the second closing argument by the Government, the prosecutor informed the jury as follows:

> It comes down to this. You either believe this man sitting right here is up to his ears in this conspiracy, not only -- not as a minor player, but one of the major players. You either believe that or you believe that you are being lied to and there is a conspiracy, but the conspiracy is on the part of Calvin Bond, the Drug Enforcement Agency, the Treasury Department, these two agents sitting right here, the United States Attorney's Office, including Mr. Clardy and myself, that we are coming in here, and not only are the Shahs and Boris Miranda lying to you, that we are. That for some reason at some point the Government decided to pick on a fine, upstanding citizen of the community, Mr. Ho. Of all the millions of people we have picked him out, and not only picked him out - -
>
> Mr. Smith: Excuse me. Your Honor, I will object to the attempt to inject personal opinion into jury argument. I don't mind to argue any evidence but not personal opinion.

The Court: The objection is overruled. Go ahead.

On 1 December 1994, the jury returned a verdict finding Petitioner guilty on Counts 1 and 2. On 17 February 1995, Petitioner was sentenced to serve two hundred thirty-five (235) months in the custody of the Attorney General, to serve four (4) years on supervised release thereafter, and to pay a fine of Fifty Thousand ($50,000) Dollars.

On 21 February 1995, Petitioner gave a timely notice of appeal of the jury verdict and the sentence.

Pursuant to 28 USC Section 1291, 18 USC Section 3742(a), and to FRAP 4(b), the United States Court of Appeals for the Fifth Circuit had jurisdiction over the direct appeal and, on 14 February, 1996, entered its Opinion affirming the conviction and later, on 9 April, 1996, entered its Order denying a Petition for Rehearing.

REASON FOR GRANTING THE WRIT

The Honorable Court is respectfully requested to exercise it supervisory authority under Supreme Court Rule 10(a) over the United States Court of Appeals for the Fifth Circuit because the Court of Appeals has sanctioned an egregious departure from the accepted and usual course of judicial proceedings.

Although the Supreme Court has clearly condemned forensic misconduct by prosecutors, stating of prosecutors that: "while he may strike hard blows, [he] is not at liberty to strike foul ones," it has thus far left to the lower courts to discern what sort of misconduct rises to the level of

reversible error. **Berger v. United States**, 295 U.S. 78, 88 (1935).

In a recent series of cases, the Supreme Court has even relaxed the standard for this type of misconduct. For example, in **United States v. Robinson**, 485 U.S. 25 (1988), the Court affirmed a conviction in which the prosecutor stated that defendant could have testified, but the prosecutor had so stated in response to defense counsel's argument.

Further, in **Darden v. Wainwright**, 477 U.S. 168 (1986), an offensive prosecutorial argument did not deprive a defendant of a fair trial.

However, the jury in the case at bar was subjected to a prejudicial unconstitutional argument of a particularly foul nature, i.e., that, in order to acquit Petitioner, the jury would have to believe that the United States would pick on a fine, upstanding citizen of the community and believe that everyone associated with the Government's case would [lie] to [the jury].

The clear implication of and the specter raised by such an argument is that the Petitioner must be presumed guilty unless he has shown that the Government is guilty of conspiracy. Such an argument was not only confusing to the jury, but where the concurrent objection was overruled by the trial judge, the clear message to the jury was tantamount to an instruction to the jury to presume that the Government only prosecutes guilty persons.

Flying in the face of the Fifth Amendment's guarantee of due process of law, the trial court and Court of Appeals sanctioned a dangerously unprecedented type of argument,

i.e., that a prosecutor may directly inform a jury that to acquit a Defendant, the jury would have to find that all of the prosecutions' witnesses are lying and conspiring to convict a "fine upstanding citizen of the community."

Our ancestors wisely added the due process clause to provide for standardized and fair methods by which a citizen might lawfully be deprived of precious freedom. They could not have contemplated that the Government could inform a trial jury that the innocent citizen is never prosecuted, otherwise jurors are ironically faced with the completely inappropriate consideration of whether the Government is guilty of bringing an insufficient or erroneous prosecution. Since Defendants can be, and are prosecuted in error, the applicability of due process presumptions of innocence cannot be conditioned on a jury believing that the process of selection for prosecution is sacrosanct.

In a case such as the one at bar, the Supreme Court should hear Petitioner on the merits in order to delineate at what point prosecutorial misconduct becomes per se unconstitutional, leaving a jury with the impression that upstanding citizens are not prosecuted.

CONCLUSION

The Honorable Court is respectfully requested to grant and issue a Writ of Certiorari to hear Petitioner on the merits of his claim that the Fifth Amendment to the United States Constitution does not contemplate core violations of

the presumption of innocence by the Government.

DATED this 8th day of September, 1996.

Respectfully submitted,

ANDRES R. RAPPARD, ESQ.

Counsel of Record for
HAO HOANG HO

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-10174
Summary Calendar

U.S. COURT OF APPEALS
FILED
FEB 14, 1995

CHARLES R. FULBRIDGE, III
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HAO HOANG HO, a/k/a/ Tommy,

Defendant-Appellant.

- - - - - - - - - - - -

Appeal from the United States District Court
For the Northern District of Texas
USDC No. 3:93-CR-296-R

- - - - - - - - - - - -

Before KING, GARWOOD, and DENNIS, Circuit Judges

PER CURIAM:*

Appellant appeals for his criminal conviction. The district court did not err in its ruling on an objection made in accordance with Batson v. Kentucky, 476 U.S. 79 (1986). United States v. Clemons, 941 F.2d 321, 323 (5th Cir. 1991). The district court did not commit reversible error in overruling an objection to the prosecutor's argument. See United States v. Palmer, 37 F.3d 1080, 1085 (5th Cir. 1994), cert. denied, 115 S. Ct. 1804 (1995).

AFFIRMED.

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*Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

s/ WG CDK, JD

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 95-10174

U.S. COURT OF APPEALS
FILED
APR -9 1996

CHARLES R. FULBRIDGE, III

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HAO HOANG HO, a/k/a/ Tommy,

Defendant-Appellant.

- - - - - - - - - - - -

Appeal from the United States District Court
Northern District of Texas, Dallas

- - - - - - - - - - - -

ON PETITION FOR REHEARING

(APR -9 1996)

Before KING, GARWOOD and DENNIS, Circuit Judges.

PER CURIAM.

IT IS HEREBY ORDERED that the petition for rehearing filed in the above case is DENIED

ENTERED FOR THE COURT:

s/ Witt Garwood

United States Circuit Judge

REHG-2

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.